EMPLOYMENT TRIBUNALS

Claimant: **Mr L Schliker**

Respondent: **Accomplish Group Ltd**

JUDGMENT

The claimant's application dated 8 November 2023 for reconsideration of the judgment sent to the parties on 25 October 2023 is refused under Rule 72(1) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 because the Tribunal considers that there is no reasonable prospect of the original decision being varied or revoked.

REASONS

Brief Summary of the proceedings

1. As one of a number of reasonable adjustments made to support the claimant (Leon) to participate fully in proceedings, by referring to him as 'Leon' during the final hearing and avoiding undue formality, which was also adopted in the written reasons to make them accessible to Leon, I make the same adjustment in these reasons.

2. Leon brought claims of disability discrimination and wrongful dismissal. The claim form was presented on 28th July 2021. At earlier preliminary hearings, it was decided that (i) the claims were brought in time (Judgment dated 24 February 2022) and that (ii) at the relevant time (11th November 2020 – 27th January 2021) Leon was a disabled person by virtue of "an undiagnosed mental impairment" (Judgment dated 9 December 2022) and the question of whether or not Leon had a disability was not in issue at the final hearing.

3. The final hearing was heard before a panel on 21, 22 and 23 August 2023 and Leon was represented by his mother, Ms Schliker and the Respondent by Counsel, Mr Brockley. The tribunal's decision and reasons were delivered orally to the parties at the final hearing. Leon's claims of disability discrimination and wrongful dismissal were dismissed.

4. Judgment was sent to the parties on 25 August 2023 and written reasons were requested by Ms Schliker on behalf of Leon and sent to the parties on 25 October 2023. The application for reconsideration of the judgment was sent to the tribunal on 8 November 2023. Unfortunately, due to a delay in forwarding correspondence to the Judge, there has been a delay in responding to this application.

Relevant Law

5. Rules 70 - 73 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) provide (in so far as is relevant) as follows:

   70 A Tribunal may ……. on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision… may be confirmed, varied or revoked. If it is revoked it may be taken again.

   71 Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all other parties) within 14 days of the date on which the written record, or other communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

   72(1) An employment judge shall consider any application made under rule 71. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the tribunal shall inform the parties of the refusal.

   72(2).....

   72(3) Where practicable, the consideration under paragraph (1) shall be by the Employment judge who made the original decision or, as the case may be, chaired the full tribunal which made it; .....

6. A tribunal dealing with an application for reconsideration must seek to give effect to the overriding objective to deal with cases fairly and justly contained within Rule 2 of the Regulations. This includes ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, so far as compatible with proper consideration of the issues, and saving expense.

7. ***Outasight VB Ltd v Brown UKEAT/0253/14*** is authority for the proposition that the change in the wording of the 2013 Rules (and in particular the removal of the specific categories which were contained at Rule 34(3)(a) – (e) of the 2004 Rules) does not signify a change in approach. The same basic principles apply as under the 2004 Rules and cases decided under the old rules are still relevant to cases under the new.

8. As was explained in ***Ebury Partners UK Ltd v Acton Davis [2023] IRLR 486*** an Employment Tribunal can only reconsider a judgment if it is necessary in the interests of justice to do so. A central aspect of the interests of justice is that there should be finality in litigation. The interests of justice include not only the interests of the person seeking a review, but also the interests of the person resisting a review on the grounds that once the hearing which has been fairly conducted is complete, that should be the end of the matter. For these reasons it is unusual for a party to be given 'a second bite of the cherry', and the jurisdiction to reconsider should be exercised with caution. Also, in general, while it may be appropriate to reconsider a decision where there has been a procedural mishap meaning that a party has been denied a fair and proper opportunity to present their case, reconsideration should not be used to correct a supposed error made

by the tribunal after the parties have had such an opportunity. This is particularly the case where the error alleged is one of law that is more appropriately corrected by the EAT (paragraph 24, ***Ebury).***

9. In relation to the submission of new evidence, tribunals, under the 2004 Rules, were expressly required to consider whether the new evidence submitted had become available since the conclusion of the hearing and whether its existence could not reasonably have been known of or foreseen at the time, Rule 34(3)(d). This reflected the guidance in ***Ladd v Marshall 1954 1 WLR 1489*** in which the Court of Appeal explained that to justify the reception of fresh evidence or a new trial three conditions must be fulfilled. Firstly it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, secondly the evidence must be such that, if given, it will probably have an important influence on the result of the case, though it need not be decisive, and thirdly the evidence must be such that it is presumably to be believed - i.e. it must be apparently credible although not incontrovertible.

10. I take from **Outasight** that these are still relevant considerations when dealing with an application for a reconsideration which involves the submission of new evidence under the 2013 Rules.

Application for Reconsideration

11. The application for reconsideration of the Judgment is in relation to knowledge of disability and wrongful dismissal. The application as set out in Ms Schliker's letter under the heading 'knowledge of disability' includes reference to selected paragraphs of findings of fact and conclusions in the tribunal's written reasons and references to selected documents in the bundle (not repeated in full here). All of the references to the specific findings and documents and points raised in relation to these have been considered.

12. Though not repeated in full, the matters set out in the application and points raised as grounds for reconsideration taken from the letter, are summarised as follows:

Knowledge of Disability

a) That by Leon expressing his frustration with online training would suggest he was struggling and in his own way asking for help.
b) Referring to page 181 of the Bundle and the comment made by Mr Elliot on the supervision report form that he thought Leon was "somehow distracted", Ms Schliker states was when Leon disclosed to him that he had Adhd. She further states that Leon has consistently said he told Mr Elliot and also that GV knew he had Adhd, as they both grew up on the same street which he explained at the hearing as the 'history' between them.
c) That there is evidence to question Accomplish's credibility in relation to disclosure of documents including late disclosure of a document on the second day of the final hearing.
d) That Mr Thomas has shown to be untruthful including in relation to a warning for lateness given to Leon and saying he was not Leon's manager at the time of the supervision review.
e) That when the disciplinary hearing took place Leon was in his own home and joined by the Teams app on his phone. It was not the usual environment. Ms Jones said she saw no indication that Leon did not understand – Ms Schliker questions how could she tell if he was on a tiny phone screen.
f) That using the words 'fuck' and 'off' was something that arose in consequence of Leon's disability and Mr Thomas did not properly and fairly investigate mitigation factors.
g) That Ms Jones said she had no knowledge of Leon's disability and if so, it

would have been reasonable of her to ask an additional question to confirm either way.

h) Reference is made to the statutory codes of practice on employment, in summary that an employer must do all that can reasonably be expected to find out whether an employee has a disability and should consider whether an employee has a disability even where one has not been disclosed and if it does not, the knowledge it would have gained had it done so is imputed to the employer.

i) Reference is made to an order in the bundle whereby an observation of Leon at an earlier preliminary hearing was that he would lapse into agreeing with questions when he became tired or overwhelmed and that this was typical behaviour that can make Leon very vulnerable.

j) That it was not mentioned in the judgement that the undiagnosed mental impairment is said to be Adhd.

Wrongful Dismissal

k) Under the heading 'wrongful dismissal' again there is a reference to a specific paragraph and finding of fact in the tribunal's written reasons and the decision. No specific point is raised or ground for reconsideration set out other than by way of a reference to a case authority (***Burdett and Aviva Employment Services Ltd***) with two extracts from the case (p.29 and p.31) that make reference to two further cases relating to the concept of gross misconduct in summary: i) that the conduct in issue would need to amount to deliberate wrongdoing or gross negligence and ii) that a finding an employer was entitled to dismiss for gross misconduct will not determine the question of fairness.

Decision

13. Rule 70 provides for reconsideration where it is 'necessary in the interests of justice'. There is an underlying public policy principle that there should be finality in litigation. An application for reconsideration is not an opportunity to re-argue a case or re-open findings of fact on matters that have been raised or identified at a hearing and on which written and oral evidence has been considered and findings made and on which the parties have had a fair opportunity to present their cases. It is not intended as means by which a party can get a 'second bite of the cherry' (***Ebury*** above).

14. The points raised in the application as summarised above focus on matters and findings of fact that were made by the tribunal after full consideration of all of the written and oral evidence of witnesses and of documents relied on by the parties that the Tribunal had before it and were referred to the Tribunal during the final hearing.

15. In relation to the matters raised in the application as summarised above at points a), d), e), f) and g) the points raised seek to re-open findings of fact made by the tribunal, which as indicated above were made after careful consideration of the evidence seen and heard at the tribunal, including from Leon and from the respondent's witnesses, which included cross examination of respondent witnesses by Ms Schliker on their evidence and where relevant relating to the points raised above.

16. On point b) relating to whether there was evidence of any disclosure by Leon of his disability to the respondent, the findings and conclusions reached were made after full consideration of the evidence seen and heard at the hearing. There were no findings, based on the documents, the evidence in Leon's written witness statement and his evidence heard at the hearing, as to the representations now made in this application that Leon disclosed that he had

adhd to Mr Elliot during his supervision review, nor that he consistently said that he had disclosed this to Mr Elliot nor that GV knew that he had adhd, when referring to their 'history', which appears to be new evidence or evidence that the tribunal was not taken to during the hearing.

17. Alternatively and for completeness, though not argued or presented as such in the application, if it is the case that the matters raised at point b) are put forward as new evidence after the hearing, the tribunal must consider the 3 conditions set out in ***Ladd v Marshall*** (above). The first condition is whether the evidence could have been obtained with reasonable diligence for use at the trial. I consider that the evidence now cited on behalf of Leon could with reasonable diligence have been included in his written witness statement prepared for the hearing or given in oral evidence at the hearing, when he was asked questions on issues relating to the respondent's knowledge of his disability including questions on the supervision review and report form and the 'history' with GV, both in cross examination or in re-examination and it was not. Therefore, I consider on balance that the first condition is unlikely to be met and there is no reasonable prospect of reconsideration based on the introduction of such new witness evidence on the part of Leon after the final hearing, proceeding further.

18. On points c) and d) as to the credibility of Accomplish and of Mr Thomas, findings were made on the evidence relevant to the issues before the tribunal. In so far as there were any submissions or findings with regard to credibility of any witnesses or the respondent generally, where relevant these are included in the findings of the tribunal and all evidence and findings were considered by the tribunal in reaching its decision. The submission of a document during the final hearing was requested by the tribunal, it having been mentioned in evidence, copies were provided to the tribunal and Ms Schliker, who was given an opportunity to read it and no objections were raised at the time to its inclusion in the bundle.

19. On point h) as recorded in the written reasons, the tribunal considered the EHRC statutory code of practice on employment, as referenced by Ms Schliker, when considering its decision.

20. On points i) and j), following a preliminary hearing on the question of disability on 9/12/22, it was determined that "at the material time (11/11/20 - 27/1/21) [Leon] was a disabled person by virtue of an undiagnosed mental impairment" as was included in the written reasons. That Leon was a vulnerable person and that an intermediary report had been obtained and recommendations made and adopted by the tribunal to accommodate and facilitate his participation in proceedings at the final hearing, and that the tribunal was mindful of this throughout including when Leon was giving evidence, was also noted and recorded in the written reasons.

21. On the grounds for reconsideration in respect of wrongful dismissal, in so far as these are understood from the letter and application for reconsideration (summarised above), Ms Schliker refers to a case authority. The tribunals factual findings on the wrongful dismissal claim and its conclusions and reasons for this including considerations of the law are set out in the written reasons. The matter was aired and argued at the tribunal and evidence was heard and submissions made by the parties and there was a fair and proper opportunity to present the case on behalf of Leon at the final hearing and reconsideration should not be used to correct a supposed error made by the tribunal after the parties have had such an opportunity (***Ebury***).

22. In summary, in light of the reasons set out above in relation to the application for reconsideration of matters relating to knowledge of disability and wrongful

dismissal, an application shall only be considered if it is necessary in the interests of justice to do so, this includes the interests of both parties to the litigation and that a central aspect of the interests of justice is that there should be finality in litigation. The application is refused because the Tribunal considers that there is no reasonable prospect of the original decision being varied or revoked.

Employment Judge K Hunt

Date 29 January 2024

JUDGMENT SENT TO THE PARTIES ON 30 January 2024

FOR THE TRIBUNAL OFFICE Mr N Roche